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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

COMMISSIONERS

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JUN 19 2007

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

DOCKETED BY	nr
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In the matter of:

DOCKET NO. S-20520A-07-0155

LEONARD FRANCIS ALCARO (a/k/a "LENNY
ALCARO"), and
MARY BRIGID LAVIN ALCARO, husband and
wife,
1140 West San Lucas Circle,
Tucson, Arizona 85704,

SECURITIES DIVISION RESPONSE TO
SPOUSE'S MOTION TO DISMISS

Respondents.

The Securities Division ("Division") of the Arizona Corporation Commission responds to the Motion to Dismiss ("Motion") filed by Respondent Mary Brigid Lavin Alcaro ("Spouse") and requests that it be denied because:

1. The Division's Notice complies with administrative law pleading standards and community property law by alleging that Spouse's husband Respondent Leonard Francis Alcaro ("Alcaro") acted to benefit Respondents' marital community.
2. The Division's financial analysis is ongoing. However, information obtained by the Division indicates that Respondents' marital community was in fact directly benefited by Alcaro's alleged violations of the Arizona Securities Act ("Act").

I. INTRODUCTION.

Spouse asks that she be dismissed from this action now, apparently with prejudice, because: (1) the Division has not alleged that Spouse was not directly involved in the securities fraud allegedly perpetrated by Alcaro; and (2) Alcaro allegedly committed a crime by violating the provisions of the Act such that Respondents' marital community is not liable for any restitution or

administrative penalties that may be assessed by the Commission. (Motion, p.2:5-8). Spouse is not correct.

For all times relevant to the Notice (i.e., July 1995 to July 2002) Spouse was (and still is) married to Alcaro. Also, at all times relevant, Spouse and Alcaro resided at the same address. Importantly, at all times relevant, Alcaro and Spouse were acting for their own benefit, and for the benefit or in furtherance of the marital community. (Notice, ¶3) Spouse's Motion neither disputes these facts, nor is it supported by admissible evidence.

II. ARGUMENT.

1. The Division has provided Spouse with ample Notice of its claims against Respondents' marital community as required by law.

The Division's Notice complies with Arizona's administrative law pleading standards. The Division is not required to file the lengthy, fact/evidentiary intensive Notice suggested by Spouse under the applicable Arizona Administrative Code:

B. The notice shall include:

1. A statement of the time, place and nature of the hearing.
2. A statement of the legal authority and jurisdiction under which the hearing is to be held.
3. A reference to the particular sections of the statutes and rules involved.
4. **A short and plain statement of the matters asserted.** If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

See, A.R.S. § 41-1061(B)(Emphasis added).

In Arizona, a liability incurred by a one spouse during marriage is presumed to be a community obligation for both spouses. *American Express Travel Related Services Company, Inc. v. Parameter*, 186 Ariz. 652, 654, 652, 925 P.2d 1369, 1371 (App. 1996); also, *Cooper v. Cooper*, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1981). Spouse has offered no evidence or argument to overcome this strong presumption.

1 Also, Spouse has the high burden of proving by **clear and convincing** evidence that the
2 remedies sought by the Division are the sole, separate debt of her husband Alcaro. *Garrett v.*
3 *Shannon*, 13 Ariz. 332, 476 P.2d 538, (App. 1970); *also, Kennedy v. Kennedy*, 93 Ariz. 252, 255,
4 379 P.2d 966, 969 (1963)(the presumption for a finding of community property can be rebutted
5 only by strong, satisfactory, convincing, clear and cogent or nearly conclusive evidence). Claiming
6 that the Division's Notice is defective does not constitute clear and convincing evidence as a matter
7 of law.

8 Importantly, specific statutes control the Commission's ability to obtain a judgment against
9 community assets. *See*, A.R.S. §§ 44-2031(C) and 25-215(D). A.R.S. § 44-2031(C) of the Securities
10 Act states that, "[t]he commission may join the spouse in any action authorized by this chapter to
11 determine the liability of the marital community." Under A.R.S. § 25-215(D), the "spouses shall be
12 sued jointly and the debt or obligation satisfied: first, from the community property, and second, from
13 the separate property of the spouse contracting the debt or obligation." (Emphasis added) Spouse's
14 Motion does not address these statutes.

15 Applied here, the Notice adequately alleges that Alcaro's alleged conduct was undertaken
16 for the benefit, or in furtherance of Respondents' marital community. Tellingly, Spouse does not
17 dispute the allegations of paragraph 3 of the Division's Notice in her Motion. That allegation,
18 dispositive of Spouse's Motion, alleges that: (1) Spouse and Alcaro were married at all times
19 relevant to the Notice; and (2) at all times relevant, Spouse *and Alcaro* were acting for their own
20 benefit and for the benefit of their marital community.

21 Because the Division's *Notice* clearly provides Spouse with a short and plain statement of
22 the Division's claims against her marital community with Alcaro in compliance with applicable
23 law, Spouse's Motion should be denied.¹ (*See*, Notice, ¶3).

25 ¹ The Motion should also be denied because R-14-3-106(H) of the applicable Rules of Practice and
26 Procedure Before the Corporation Commission states that an, "Answer **shall** include a motion to dismiss if
a party desires to challenge the sufficiency of the complaint." In this case, Spouse's April Answer to the

1 **2. Spouse's Motion is Premature.**

2 The Division's financial analysis is ongoing. On this point, it should be noted that Alcaro has
3 not even filed his Answer to the Notice. Nevertheless, information obtained by the Division indicates
4 that Spouse's marital community with Alcaro was directly benefited by Alcaro's alleged conduct.
5 Additionally, Alcaro improperly refused to appear and participate in his lawfully noticed examination
6 under oath on March 21, 2007. (**Tab 1**, Subpoena personally served on Alcaro at Respondents'
7 Tucson residence on February 8, 2007; **Tab 2**, letter re: Alcaro refusal to attend EUO; **Tab 3**,
8 Division letter demonstrating Alcaro's wrongful refusal to participate in his EUO).

9 Further, it is hard to imagine just how Alcaro's conduct in obtaining and keeping hundreds
10 of thousands of dollars in investor money could not directly or indirectly benefit his marital
11 community with Spouse. Nevertheless, because Alcaro's alleged conduct benefited his marital
12 community as presumed by both the allegations in the Notice and controlling law, Spouse's Motion
13 should be denied. (*See*, Notice, ¶3).

14 **3. Spouse's Criminal-Based Arguments Lack Merit.**

15 This is an administrative law action in which Respondents may be found strictly liable for
16 conduct violating the Securities Act.¹ Spouse fails to recognize, for instance, that in the remedy
17 phase of this matter, the Commission will not be able to imprison either Respondent. Further,
18 Spouse's Motion is based on the premise that her husband committed crimes, despite the fact that
19 the Administrative Law Judge has not yet proposed findings of fact or conclusions of law to be
20 adopted by the Commission. Thus, Spouse's criminal-based arguments are irrelevant. *See*, A.R.S.
21 § 25-215(D) (spouses shall be sued).

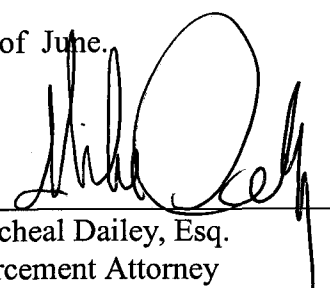
22
23 Notice does not contain, nor was it filed contemporaneously with her Answer. Because Spouse's Motion
violates the plain language of R-14-3-106, it should be denied.

24 ¹ The registration and fraud claims in this case are based on *strict liability*. The Division does not have to
25 prove traditional elements like intent, causation, damages or reliance. *See e.g.*, *State v. Gunnison*, 127 Ariz.
26 110, 113, 618 P.2d 604 (1980); *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887 (App.1981); *Barnes v.*
Vozack, 113 Ariz. 269, 550 P.2d 1070 (1976); *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553,
733 P.2d 1131 (1986).

1 **III. CONCLUSION.**

2 Based on the foregoing, the Division respectfully requests that Spouse's Motion be denied.

3 **RESPECTFULLY SUBMITTED** this 19th day of June.

4 
5
6 J. Micheal Dailey, Esq.
7 Enforcement Attorney
8 Securities Division
9 1300 West Washington, Third Floor
10 Phoenix, Arizona 85007

11 **ORIGINAL AND THIRTEEN (13) COPIES**

12 of the foregoing filed this 19th day of
13 June, 2007 with:

14 Docket Control
15 Arizona Corporation Commission
16 1200 West Washington
17 Phoenix, Arizona 85007

18 Copy of the foregoing hand-delivered this 19th day
19 of June, 2007 to:

20 Mr. Marc Stern
21 Administrative Law Judge
22 Arizona Corporation Commission
23 Hearing Division
24 1200 West Washington
25 Phoenix, Arizona 85007
26

1 Copy of the foregoing
mailed this 19th day of June, 2007 to:

2 Michael J. Vingelli, Esq.
3 VINGELLI & ERRICO
Bank of America Plaza
4 33 North Stone Avenue, Suite 1800
Tucson, Arizona 85701
5 Attorneys for Respondents

6
7 By:  _____
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TAB 1

SUBPOENA

SECURITIES DIVISION

ARIZONA CORPORATION COMMISSION

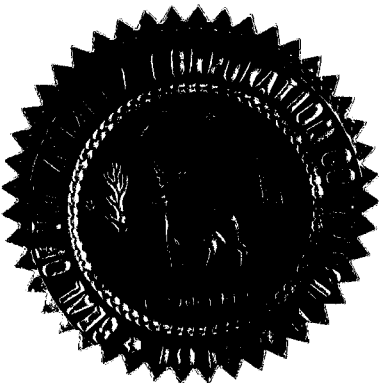
TO: Leonard F. Alcaro
1140 W. San Lucas Circle
Tucson, AZ 85704

In the Matter of

Leonard F. Alcaro file number 7749

involving possible violations of the Securities Act
and/or Investment Management Act of Arizona.

PURSUANT TO A.R.S. §44-1823 AND A.R.S. §44-3133, YOU ARE HEREBY REQUIRED to appear before **Michael Dailey** of the Securities Division of the Arizona Corporation Commission at 1300 West Washington, Third Floor, Phoenix, Arizona 85007, on the 21st day of **March, 2007**, at **12:30 p.m.**, to PROVIDE TESTIMONY and PRODUCE THE DOCUMENTS LISTED IN EXHIBIT "A" which is attached and incorporated by reference.



The seal of the Arizona Corporation Commission is affixed hereto, and the undersigned, a member of said Arizona Corporation Commission, or an officer designated by it, has set his hand at Phoenix, Arizona this 7th day of February, 2007.

A handwritten signature in black ink, appearing to read 'Julie Coleman', is written over a horizontal line.

Julie Coleman
Assistant Chief Counsel of Enforcement
Securities Division

Persons with a disability may request a reasonable accommodation such as a sign language interpreter, as well as request this document in an alternative format, by contacting Linda Hogan, Executive Assistant to the Executive Director, voice phone number 602/542-3931, e-mail lhogan@azcc.gov. Requests should be made as early as possible to allow time to arrange the accommodation.

Pursuant to A.R.S. §44-1825 and A.R.S. §44-3133, failure to comply with this subpoena may result in the application for a finding of contempt.

Pursuant to A.A.C. R14-4-305, any person required to appear at a formal interview may be represented by legal counsel.

AFFIDAVIT OF SERVICE (INDIVIDUAL)

State of Arizona)
County of MARICOPA) ss.:

KEISTA CHAPMAN, being duly sworn, deposes and says:

I, for the Securities Division of the Arizona Corporation Commission, Phoenix, Arizona, served an original of this subpoena by:

X Personal Service on the person named in the subpoena.

_____ Leaving a copy at the dwelling house of the person named in the subpoena with a person of suitable age (not less than 16 years of age) and discretion, then residing there.

_____ Leaving a copy at the usual place of business or employment of the person named in the subpoena with an employee, express or implied agent, supervisor, owner, officer, partner, or other similar person of suitable age and discretion (not less than 16 years of age).

_____ Leaving a copy with an agent authorized by express or implied appointment or by law to receive process for the person named in the subpoena.

_____ Mailing a copy, by certified mail with return receipt requested, in an envelope addressed to the last known dwelling house or usual place of abode or last known business address, postage prepaid.

Name of Person Served: LEONARD ALVARO

Relationship to Person Named: SAME

Place of Service: 1140 W. SAN LUCAS CIRCLE TUSON, AZ 85704

Time and Date of Service: 2/8/07 0812 HRS

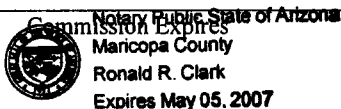
Service Performed by: KEISTA CHAPMAN

Title: SPECIAL INVESTIGATOR

Signature of Affiant: [Signature]

Sworn to before me this 9 day of FEBRUARY, 2007.

[Signature]
Notary Public



AFFIDAVIT OF SERVICE (BUSINESS ENTITY)

State of Arizona)
County of _____) ss.:

_____, being duly sworn, deposes and says:

I, for the Securities Division of the Arizona Corporation Commission, Phoenix, Arizona, served an original of this subpoena by:

_____ Leaving a copy with an employee, of suitable age and discretion, (not less than 16 years of age) at any place of business of the corporation, partnership, trust, limited liability company, association, or other business entity.

_____ Leaving a copy with any officer or director of a corporation, managing or general partner of a partnership, trustee of a trust, member of a member-managed limited liability company, manager of a manager-managed limited liability company or any authorized representative of an association or other business entity.

_____ Leaving a copy with an agent authorized by express or implied appointment or by law to receive process for the entity named in the subpoena.

_____ Mailing a copy, by certified mail with return receipt requested, in an envelope addressed to the last known business address, postage prepaid.

Name of Person Served: _____

Relationship to Entity Served: _____

Place of Service: _____

Time and Date of Service: _____

Service Performed by: _____

Title: _____

Signature of Affiant: _____

Sworn to before me this _____ day of _____, _____.

Notary Public

Commission Expires

Exhibit "A"

From the period beginning **January 1, 1995 to January 1, 2003**, all documents, contracts, agreements, records, books, correspondence, e-mails, and any other papers, whether stored on electronic media or otherwise, incident or relating to each of the following:

- A. Leonard F. Alcaro and any of his related businesses, entities and/or foreign currency trading programs;
- B. Knights of Columbus;
- C. St. Francis De Sales Catholic Church; and
- D. Trinity Court Management ("Trinity Court") in the Guernsey (Channel) Islands,

including, but not limited to:

1. All operating agreements, articles of incorporation or organization, bylaws, and annual reports, including any amendments thereto, and any merger, asset purchase or sales agreements;
2. A written list of all names, addresses, and telephone numbers of all past and present officers and directors, general or limited partners, managers or members including, without limitation, and any foreign currency exchange market (i.e., "forex") traders;
3. All records of the terms and amount of commissions, salaries, bonuses, draws, fees, loans, reimbursement, distributions, refunds, redemptions or any other compensation or consideration of any kind paid to any name listed in response to paragraph 2 above;
4. All financial statements, annual and quarterly financial reports, whether audited or unaudited, professionally or in-house, with accompanying footnotes and any auditor's reports, and the names, addresses and telephone numbers of any person(s) and/or entities who produced any part of such statements and reports;
5. All assets, equity, liabilities and any investments;
6. All documents submitted for the purpose of compliance, reporting, registration, or seeking exemptions from registration with any state, federal or self-regulatory securities agency, including, without limitation, any securities, investment advisor or commodity futures licenses or registrations;
7. All state and federal tax returns, including any related correspondence, documents or amendments;
8. All accounting records and books of original entry including but not limited to, cash receipts journal, cash disbursements journal, sales journals, general journal, subsidiary journals, general ledger, subsidiary ledgers, and chart of accounts;

9. All bank or other depository institution accounts including, without limitation, any foreign currency and/or forex broker/trading platform accounts, of the persons or entities listed above, including:

- a. the name of the bank or depository institution and address of the branch at which the account is located;
- b. the name and number of each account;
- c. the names of all signatories on each account;

10. Copies of all written descriptions, advertisements, announcements, circulars, offering materials or memorandum, subscription documents, tax or legal opinions, brochures, commercials or infomercials, audio recordings, conference calls or press releases, that appeared in any media, including newspapers, trade journals, magazines, radio, television, or on the Internet in either electronic or paper form including, without limitation, and copies of all past or present web pages;

11. A written list of names, addresses, and telephone numbers of all individuals or entities that have been offered, sold or provided investments, investment contracts, commodity investment contracts, limited liability company membership or ownership interests, units, securities of any kind or stock in or relating to persons or entities listed above;

12. Documents provided or made available to each individual or entity listed in response to paragraph 11 including, without limitation, any contracts or agreements, tax or legal opinions, reports, handouts, brochures, investment contracts, membership or ownership interests, units, agreements, forms, subscriptions, notes, questionnaires, records of investment or equity status, checks, wire transfers, receipts, account statements, tax information, and any correspondence, e-mails, updates, or other communications;

13. A written list regarding the amounts and dates of each investment in or with the persons or entities listed above, made by each individual or entity listed in response to paragraph 11;

14. A written list of the amounts and dates of any interest payment, bonus, earnings, distribution, refund, redemption, dividend, stock split, spin-off, rescission, refund, or any other form of returns or losses to each individual or entity listed in paragraph 11;

15. Names and addresses of all shareholders, members and equity owners of the entities listed above, including the amount of shares or interests held and all share certificates or other evidence of ownership;

16. Complete copies of any and all forms of investments, investment contracts, commodity investment contracts, securities or stock offerings;

17. All documents concerning any civil, criminal or administration actions or lawsuits filed by or against the persons or entities listed above in any federal, state, administrative or self-regulatory agency forum; and

18. Any documents, agreements or contracts by and between the persons or entities listed above.

19. All documents relating to any criminal, civil or administrative actions filed by or against to the persons or entities listed above including, without limitation, any bankruptcy proceedings.

COMMISSIONERS
JEFF HATCH-MILLER - Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
GARY PIERCE

BRIAN C. McNEIL
EXECUTIVE DIRECTOR



MATTHEW J. NEUBERT
DIRECTOR

SECURITIES DIVISION
1300 West Washington, Third Floor
Phoenix, AZ 85007
TELEPHONE: (602) 542-4242
FAX: (602) 594-7470
E-MAIL: securitiesdiv@azcc.gov

ARIZONA CORPORATION COMMISSION

February 8, 2007

PERSONAL SERVICE

Leonard F. Alcaro
1140 W. San Lucas Circle
Tucson, AZ 85704

RE: Leonard F. Alcaro, File #7749

Dear Mr. Alcaro:

Attached is a Subpoena for your appearance on March 21, 2007 at 12:30 p.m. at the offices of the Securities Division of the Arizona Corporation Commission, 1300 West Washington, Third Floor, Phoenix, Arizona. On that date and time, you must produce the documents listed on Exhibit "A" of the Subpoena and appear for testimony under oath.

Under the Rules of the Arizona Corporation Commission relating to formal interviews, an individual has the right to be accompanied, represented and advised by counsel. This gives you the right to have an attorney present during formal interviews and to have an attorney provide legal advice before, during and after such interviews. Your attorney may also question you briefly at the conclusion of the interview for the purpose of clarifying any of your prior testimony, and he or she may also make summary notes during the interview solely for your and your attorney's use.

Please note that the above-referenced Rules prohibit a particular attorney from representing you under certain circumstances. For your convenience, we have enclosed a copy of those Rules.

This Subpoena is being served upon you with sufficient notice in order to enable you to retain the services of an attorney, if you so wish. If you, or your attorney, have any questions regarding the above or the attached Subpoena, please feel free to contact the undersigned at (602) 542-1508.

Sincerely,

Krista Chapman
Special Investigator

KC/kc

R14-4-304. Rights of witnesses; formal interview; procedures

A. Any person required or requested to appear as a witness at a formal interview may be accompanied, represented, and advised by a lawyer. The lawyer's roll during the formal interview shall be limited to the following activities:

1. Giving legal advice to the witness before, during, and after the formal interview;
2. Questioning the witness briefly at the conclusion of the formal interview for the purpose of clarifying any testimony the witness has given; and
3. Making summary notes during the formal interview solely for the use of the witness and the lawyer.

B. Notwithstanding Subsection (A), the following lawyers may not represent witnesses:

1. Any lawyer who has represented another witness who has testified at a formal interview in the examination or investigation,
2. Any lawyer who has represented another person who is a subject of the examination or investigation,
3. Any lawyer who may be a material witness in the examination or investigation,
4. Any lawyer who is subject of the examination or investigation.

C. The Director may permit a lawyer to represent a witness in those situations described in subsections (B)(1) through (B)(4) upon a showing that such representation should be permitted in the interest of justice and will not obstruct the examination or investigation. If a lawyer is not permitted to represent a witness under Subsection (B), that lawyer's partners or associates of the lawyer's law firm are also precluded from representing the witness.

D. All formal interviews may be recorded by the Division either mechanically or by a shorthand reporter employed by the Division. No other recording of the formal interview will be permitted, except summary note taking.

E. In addition to the persons identified in subsections (A), (C), and (D), the following individuals may attend a formal interview:

1. Individuals employed by the Commission or the office of the attorney general.
2. Members of law enforcement or other state, federal, or self-regulatory agencies authorized by the Division.
3. Translators authorized by the Division.

TAB 2

LAW OFFICES OF
VINGELLI & ERRICO

MICHAEL J. VINGELLI*
MELISSA ERRICO

BANK OF AMERICA PLAZA
33 NORTH STONE AVENUE
SUITE 1800
TUCSON, ARIZONA 85701

AREA CODE 520
TELEPHONE 791-0900
FACSIMILE 623-9055

*A PROFESSIONAL CORPORATION

March 20, 2007

LeRoy Johnson
Arizona Corporation Commission
1300 West Washington
3rd Floor
Phoenix, Arizona 85007

*Re: Leonard F. Alcaro
File No. 7749; Objection to Subpoena*

Dear Mr. Johnson:

The Respondent, Leonard F. Alcaro is unable to comply with the subpoena served upon him, and objects to the subpoena for the following reasons:

1. The defendant has a 5th amendment right pursuant to the Constitution of the United States not to incriminate himself. The testimony and document production that the subpoena compels, if disclosed and judgment is entered against the Respondent, could possibly subject the Respondent to criminal charges. A.R.S. § 41-1066(A) provides that
a person may not refuse to attend and testify or
produce evidence sought by an agency in an action,
proceeding or investigation...unless it constitutes
the compelled testimony or the private papers of
the person which would be privileged evidence
either pursuant to the fifth amendment of the
Constitution of the United States or article II,
section 10, Constitution of Arizona, and the person
claims the privilege prior to the production of the
testimony or papers.

The Respondent acted in good faith by complying with the Commission's initial request for production of documents by supplying the Commission his tax returns for the period in question, and his bankruptcy file. Other

documents and testimony the Commission is trying to compel constitute compelled testimony and private papers which are privileged.

2. We believe the investigation is related to debts or obligations which were, or may have been, discharged. While it is true that under 11 U.S.C. § 523(a)(19) debts resulting from violations of the Arizona Securities Act are non-dischargeable, the debts in question have already been discharged in bankruptcy and it is the Commission's burden to prove the discharged debts were the result of violations of the Arizona Securities Act. The Commission is in receipt of the Respondent's tax returns and his bankruptcy file. If the Commission can not prove that the discharged debts were the result of violations of the Arizona Securities Act at this time, then there are no violations to be investigated.
3. The current investigation constitutes harassment of the Respondent by the Complainants because the claims by the victims in question have already been discharged in bankruptcy. Under *Carrington v. Arizona Corp. Com'n*, 199 Ariz. 303, 18 P.3d 97 (App. 2000), a party may resist the Commission's subpoena on grounds that the investigation is being used for an improper purpose, such as to harass. Because the debts in question were discharged in bankruptcy, the Complainants can no longer sue or proceed to collect their claim except as restitution in a criminal proceeding, or by a negotiated settlement prior to criminal charges being initiated; and therefore, have initiated this investigation in the alternative. The sole purpose of initiating this investigation was for the Complainants to harass the Respondent. This harassment is evidenced by the Commission's failure to find a violation of the Arizona Securities Act, despite the evidence it already has in its possession from the Complainants and the Commission's investigation.
4. The Respondent is no longer a resident of the State of Arizona, and therefore is not subject to the jurisdiction of the Commission. A.R.S. § 41-1061(A) provides that "in a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice...." A.R.S. § 41-1061(B)(2) provides that such notice shall include "a statement of the legal authority and jurisdiction under which the hearing is to be held." The Commission has no jurisdiction over the Respondent to compel testimony, to compel a personal appearance at a hearing, or to enforce a subpoena. Further, the Commission must apply to the courts of Arizona to enforce the Commission's subpoena. Even though the Respondent was served with a subpoena, the Arizona Superior Court can only compel compliance or hold the Respondent in contempt for failure to comply. Until there is a criminal charge, I do not believe the Respondent can be arrested or extradited to Arizona. If I am incorrect, please provide me with

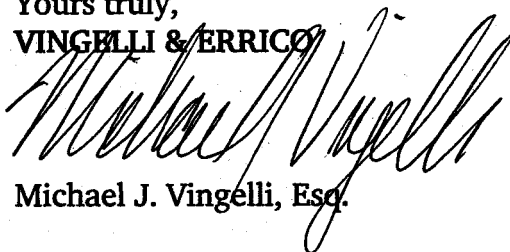
LAW OFFICES OF
VINGELLI & ERRICO

the authority to bring the Respondent back to Arizona without a criminal charge pending.

At the present time, Mr. Alcaro will not attend the hearing scheduled on March 21, 2007 at 12:30 p.m., and undersigned counsel will not attend the hearing on Respondent's behalf. You are authorized to provide a copy of this letter to the clerk and the Commission members for review at the time of the scheduled hearing.

This office will continue to represent Mr. Alcaro. Mr. Alcaro has agreed to answer specific questions through counsel, or will consider answering specific questions presented to him in writing. Again, the questions must be specific. Mr. Alcaro would like to cooperate with the Commission and put this investigation behind him, but unfortunately, he will not compromise his rights; and therefore, has retained this office to represent him through the conclusion of this investigation.

Yours truly,
VINGELLI & ERRICO

A handwritten signature in black ink, appearing to read "Michael J. Vingelli", is written over the typed name and firm name.

Michael J. Vingelli, Esq.

Cc/

Julie Coleman, Assistant Chief Counsel of Enforcement
Michael Dailey, Enforcement Attorney
Krista Chapman, Special Investigator
Steven Ulrich, Special Investigator

TAB 3

COMMISSIONERS
MIKE GLEASON - Chairman
JEFF HATCH-MILLER
WILLIAM A. MUNDELL
KRISTIN K. MAYES
GARY PIERCE

BRIAN C. McNEIL
EXECUTIVE DIRECTOR



MATTHEW J. NEUBERT
DIRECTOR

SECURITIES DIVISION
1300 West Washington, Third Floor
Phoenix, AZ 85007
TELEPHONE: (602) 542-4242
FAX: (602) 594-7470
E-MAIL: securitiesdiv@azcc.gov

ARIZONA CORPORATION COMMISSION

March 27, 2007

VIA FACSIMILE & U.S. MAIL

Mr. Michael J. Vigelli, Esq.
Law Offices of Vingelli & Errico, P.C.
Bank of America Plaza
33 North Stone Avenue, Suite 1800
Tucson, Arizona 85701

RE: *In re Alcaro*, Docket No. S-20520A-07-0155

Dear Mr. Vingelli:

This letter responds to yours dated March 20 regarding your client, Mr. Alcaro. I am the enforcement attorney assigned by the Securities Division to the above listed matter involving your client. Please find enclosed a copy of the Notice of Opportunity for Mr. Alcaro. Please advise whether you will also be representing Mrs. Alcaro in this matter.

As you know, your client was personally served at his West San Lucas Circle residence with a lawful subpoena for both documents and testimony on February 8, 2007. As noted in part by the statutes referenced in the subpoena, the Division has broad powers to investigate actual or possible violations of the Securities Act including, without limitation, the right to examine a person under oath. *See e.g.*, A.R.S. §§ 44-1822 & 44-1823. Thus, contrary to your March 20 letter, there is absolutely nothing harassing about either our investigation or the subpoena for testimony.

Your letter states that your client refused to attend his examination under oath on March 21 because he is invoking his 5th Amendment right against self-incrimination. However, the 5th Amendment is a personal right that must be invoked by the holder. Thus, established case law holds that, as here, it is improper and insufficient for any attorney to purport to invoke the 5th Amendment right against self incrimination on behalf of his client. *Moran v. Burbine*, 475 U.S. 412, 433, fn. 4, 106 S.Ct. 1135 (1986)(noting that the Fifth Amendment right against self-incrimination is a personal right, "that can only be invoked by the individual whose testimony is being compelled;" Court held that during interrogation, police rebuffed attorney who had been hired by a Mirandized suspect's sister, where suspect had not requested assistance of counsel); *State v. Hyder*, 128 Ariz. 253, 255, fn.1, 625 P.2d. 316, 318, fn.1 (1981)("In moving to quash the subpoena, Mehrens also invoked his client's right against compelled self-incrimination guaranteed by the Fourteenth Amendment. Since that right is a personal one, Mehrens may not

claim it on behalf of his client.”); *State v. Williams*, 793 N.E.2d 446, 448 (Ohio 2003)(“Penamon, even as an attorney, could not invoke Williams's Fifth Amendment rights because such rights are personal to Williams. This principle is true even though Penamon had asked police not to question Williams and later went to the police station and asked to talk with Williams.”). Thus, Mr. Alcaro was obligated to both appear for his EUO, and to personally invoke his right against self incrimination. He did not, in violation of applicable law.

You also cited A.R.S. § 41-1066(A) for the proposition that Mr. Alcaro was justified in refusing to appear for his EUO. You are not correct for 2 reasons. First, nothing in that statute permits any person from refusing to attend an EUO or deposition. Rather, it merely states the obvious; that one may not be compelled to incriminate oneself under the U.S. and Arizona Constitutions during an EUO. Second, you have ignored the plain language of the state that unambiguously states that, “A person may not refuse to attend and testify...unless it constitutes the compelled testimony...” The Division’s subpoena does not *compel* testimony from Mr. Alcaro if he invokes his Fifth Amendment right against self-incrimination. There is no court order compelling Mr. Alcaro to testify despite his constitutional rights, or to produce any document. The Division has not even filed a motion to compel. Thus, your clients’ refusal to appear at his EUO and personally invoke his Fifth Amendment right is improper, and any legal advice he received regarding the same was unethical.

Second, you claim that Mr. Alcaro was justified for refusing to attend his EUO because some of the debts he owes to his investors were discharged in his bankruptcy. You correctly acknowledge that under 11 U.S.C. §§ 523(a)(19)(a)(A) & (B), debts arising from violations of the Arizona Security Act are non-dischargeable. *See, In re Dupree*, 336 B.R. 520, 531 (M.D.Fla. 2005)(“523(a)(19) allows a securities claim to be prosecuted through final judgment, order or settlement agreement despite the filing of bankruptcy, and provides that such claim (or arbitration award) would be nondischargeable...Accordingly, in this case, although an order had not been entered by the State Court confirming the [NASD] arbitration award, the Debtor's motion for summary judgment as to Count III should be denied.”); *also*, 11 U.S.C. 523(a)(2)(A)(debts incurred through fraud are non-dischargeable). As evidenced by the enclosed Notice, there is ample evidence that your client committed numerous securities registration and fraud violations.

Most importantly, your letter fails to acknowledge that 11 U.S.C. § 362(b)(4) expressly and unambiguously exempts the above titled matter from the automatic stay relating to your clients bankruptcy. Under § 362(b)(4), the Division does not have to file a motion to lift the stay to proceed with this action. Nevertheless, should you chose to file a pleading in Bankruptcy Court regarding this matter in order to needlessly run up your clients’ legal fees, we will file a motion to lift the stay out of deference to the Bankruptcy Court. The Division has never had a stay not lifted for proceedings analogous to this one. *See e.g., SEC v. Towers Financial Corporation*, 205 B.R.27, 31 (S.D.N.Y. 1997)(court in *Towers* noted that according to the, “Ninth Circuit Court of Appeals, the policy behind §362(b)(4) is to prevent the bankruptcy court from becoming a haven for wrongdoers.”); As the *Towers* Court stated:

Where a governmental unit is suing a debtor to prevent or stop violation of fraud, ... or similar police or regulatory laws, or attempting to fix damages for violations of such law, the action or proceedings is not stayed under the automatic stay."

Id at 29-30 (citing *S.Rep.No.95-989* at 52, reprinted in 1978 U.S. Code Cong. and Admin. News at 5787, 5838, court held that SEC's action against Chapter 7 debtor, arising from alleged Ponzi scheme involving sale of promissory notes, which sought injunctive relief and disgorgement from debtor, was not stayed under automatic stay, as it was instituted by governmental unit to protect public from future fraud, rather than for pecuniary gain); also, *A City of New York v. Exxon*, 932 F.2d 1020, 1024 (2nd Cir. 1991)(governmental actions under the CERCLA to recover costs expended in response to completed environmental violations are not stayed by the violator's filing for bankruptcy). Thus, the Division will seek the Bankruptcy Court's approval of the final order in this case, but is not required to do so prior to the entry of the same.

Third, you claim that the Corporation Commission does not have jurisdiction over Mr. Alcaro because he allegedly no longer resides in Arizona. Your unsupported assertion that tortfeasors may escape the jurisdiction of Arizona courts merely because they purportedly leave the state after their malfeasance lacks merit. Under Ariz. R. Civ. P. 4.2 (a), jurisdiction over an out-of-state defendant exists to the maximum extent permitted by the Arizona and United States Constitutions. *A. Uberti and C. v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995). When it is established that a defendant has sufficient "minimum contacts" with Arizona, a court may assert either general or specific jurisdiction. *Taylor v. Fireman's Fund Ins. Co.*, 161 Ariz. 432, 435, 778 P.2d 1328, 1331 (1989). In this case, the Court has both general and specific jurisdiction over Mr. Alcaro.

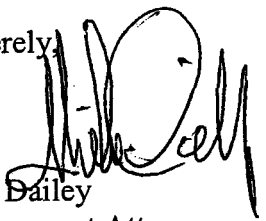
Indeed, at all times relevant, Mr. Alcaro conducted "systematic and continuous" business operations within Arizona such that he can reasonably anticipate being haled into an Arizona court for virtually any claim. *Taylor*, 161 Ariz. at 435, 778 P.2d at 1331. Here, all of the investments at issue were executed in Arizona. Mr. Alcaro solicited the investors while he resided in Arizona. The investment contracts were expressly made between Arizona investors and Mr. Alcaro when he resided in Tucson. His wife still resides in Arizona. Mr. Alcaro had many face-to-face meetings with the Arizona investors giving rise to the illegal investments in Arizona. Mr. Alcaro deposited investor funds in his Arizona bank account and, in a few instances, repaid some money from the same to Arizona residents. It is completely irrelevant whether or not the West Defendants abandoned their Arizona residence and moved to California at about the same time Plaintiffs filed the instant case. *A. Uberti and C. v. Leonardo*, 177 Ariz. 451, 453, 868 P.2d 1034, 1036 (App. 1993) (events occurring after conduct out of which lawsuit arises are irrelevant to analysis of specific jurisdiction).

In addition, Arizona's specific jurisdiction test queries whether: (1) the defendant purposefully avails himself of the privilege of conducting business in Arizona; (2) plaintiff's claims arise out of or relate to the defendant's contact with Arizona; and (3) the exercise of personal jurisdiction is reasonable. *Williams v. Lakeview Co.*, 199 Ariz. 280, 13 P.3d 280, 282 (2000). In this case, all three prongs of the specific jurisdiction test are satisfied. See e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417 (9th Cir. 1997)("if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents. It is not required that a defendant be physically present within, or have physical contacts with, the forum,

provided that his efforts are 'purposefully directed' toward forum residents."); *Calder v. Jones*, 465 U.S. 783, 789, 104 S.Ct. 1482, 1487 (1984) (defendant who directs his actions at a resident in the forum has "fair warning" he may have to litigate there); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201 (1957)(even a single act that has, "substantial connection" with the forum state is sufficient to support a finding of jurisdiction). In addition to the foregoing, the Corporation Commission clearly has jurisdiction over Mr. Alcaro by virtue of the fact that the investments at issue were entered into in Arizona. See *Sullivan v. Metro Productions, Inc.*, 150 Ariz. 573, 577, 724 P.2d 1242, 1246 (App. 1986)(court had jurisdiction over defendants charged with violations of securities laws where contract giving rise to charges was executed in state, plaintiffs' payments were made in state and plaintiffs were state residents); *Powder Horn Nursery v. Soil and Plant Lab., Inc.*, 20 Ariz.App. 517, 523, 514 P.2d 270, 277(App. 1973)(sufficient minimum contacts found when California corporation engaged in sustained contractual activity purposeful calculated and intended to have a direct effect in Arizona). But for such investments, the Division would not have filed the above referenced Notice.

Please let me know if you are willing to accept service on behalf of Mr. Alcaro. If not, rest assured that he will eventually be served in the future with the assistance of out-of-state regulatory or law enforcement agencies, if necessary. If we are unnecessarily forced to find and serve Mr. Alcaro, I will seek to impose the costs relating to the same on your client, in addition to the maximum penalties allowed by law, etc. In short, if your client is interested in amicably resolving this matter with as little expense as possible, I would strongly suggest that you accept service on behalf of Mr. Alcaro so that we can begin settlement negotiations.

Sincerely,



Mike Dailey
Enforcement Attorney
(602) 542-0722 (Direct Line)
Enclosure